

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2003

Mr. Miles J. LeBlanc
General Counsel
Houston Community College System
P.O. Box 667517
Houston, Texas 77266-7517

OR2003-8244

Dear Mr. LeBlanc:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191166.

The Houston Community College System (the "system") received a request for "any confidential files held about [the requestor, a former system employee] that (a) deal with the reasons for my non-renewal of my contract and (b) why I was put on Administrative Leave by [the system]." You indicate that some responsive information is the subject of Open Records Letter No. 2003-5637 (2003), issued August 13, 2003. You further claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you indicate that some of the information responsive to the present request is identical to information that was the subject of Open Records Letter No. 2003-5637 (2003). We note that section 552.007 prohibits a governmental body from selectively disclosing information that is not confidential by law. *See Gov't Code 552.007.* You do not inform us of any change in the law, facts, or circumstances upon which Open Records Letter No. 2003-5637 is based. We therefore make the following determination: to the extent Open Records Letter No. 2003-2997 required the system to release information that is also responsive to the present request, the system must release such information in compliance with Open Records Letter No. 2003-5637. To the extent Open Records Letter No. 2003-5637 allowed the system to withhold information that is also responsive to the

present request, the system may continue to rely on our decision in Open Records Letter No. 2003-5637 with respect to such information. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received a ruling, (3) prior ruling concluded that same records or information are or are not excepted from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

Next, with respect to the submitted information, we must address the system's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The system failed to submit a copy of the written request for information within the fifteen business day deadline mandated under section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). However, sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. Thus, section 552.107 and section 552.111 do not demonstrate compelling reasons to withhold information from the public. *See* Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Furthermore, you have not demonstrated a compelling reason to withhold the submitted information pursuant to the attorney-client privilege. *See* Open Records Decision Nos. 676 at 12 (2002) (compelling reason may be demonstrated for

attorney-client privileged communications if it is shown that the release of the information would harm a third party). Consequently, we determine that the system may not withhold any portion of the submitted information pursuant to section 552.107 or section 552.111 of the Government Code.

We also understand you to represent that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with rule 192.5 of the Texas Rules of Civil Procedure, which encompasses the attorney work product privilege.¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” As this office recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2. While the Texas Supreme Court has held that the Texas Rules of Evidence are “other law” that makes information expressly confidential for the purposes of section 552.022 of the Government Code, the information at issue here does not come within the scope of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, *City of Georgetown* is not applicable in this instance. Accordingly, the system may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence or the Texas Rules of Civil Procedure.

You also contend that portions of the submitted information are excepted from disclosure pursuant to section 552.114 of the Government Code, which excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” This office generally has treated “student record” information under section 552.114(a) as the equivalent of “education record” information that is protected by the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. *See* Open Records Decision No. 634 at 5 (1995). Because section 552.114 and FERPA can provide a compelling reason to withhold information from disclosure, we address your claim under FERPA.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

¹You raise rule 166.3(a) of the Texas Rules of Civil Procedure. We note that rule 192.5 provides the definition and scope of protection of attorney work product under the Texas Rules of Civil Procedure.

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Information must be withheld from required public disclosure under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 (1982), 206 (1978). Upon review, we find that the submitted documents contain information identifying a particular system student. We have marked student identifying information in the submitted documents that the system must withhold pursuant to FERPA.

In summary, to the extent that information responsive to the present request is identical to information that was the subject of Open Records Letter No. 2003-5637, the system must comply with Open Records Letter No. 2003-5637 in responding to the present request. We have marked student identifying information in the submitted documents that the system must withhold pursuant to FERPA. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 191166

Enc: Submitted documents

c: Mr. Benito Alcala
5116 Gano Street
Houston, Texas 77009
(w/o enclosures)

CAUSE NO. GN304570

HOUSTON COMMUNITY
COLLEGE SYSTEM,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 126TH JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff, Houston Community College System, and Defendant, Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Benito Alcala, was sent reasonable notice of this setting and of the parties' agreement that Houston Community College System may withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that: **FILED**

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Amari Rodriguez-Rendon
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

1. Exhibit A to HCCS's submission to the Attorney General, a memorandum, dated August 7, 2003, from legal counsel to the chancellor is excepted from disclosure by Tex. Gov't Code § 552.107(1), and the HCCS may withhold Exhibit A from the requestor.

2. The HCCS shall release Exhibit B to HCCS's submission to the Attorney General, a memorandum, dated August 7, 2003, from the chancellor to the executive director of Distance Education, in redacted form, to the requestor, promptly upon receipt by the HCCS of the Agreed Final Judgment signed by the Court if it has not already done so. The redacted information in Exhibit B, as described in the Settlement Agreement between the parties, is excepted from disclosure by Tex. Gov't Code § 552.107(1), and the HCCS may withhold this information from the requestor.

3. All costs of court are taxed against the parties incurring the same;


4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

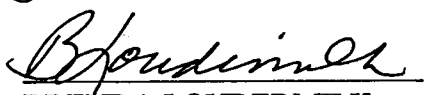
SIGNED this the 23 day of November, 2004.


PRESIDING JUDGE

APPROVED:


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